Supreme Court, U.S.
FILED
JUL 2 2003
OFFICE OF THE CLERK

No. 02-1019

In The Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

RODNEY JOSEPH GANT,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed December 23, 2002.
Certiorari Granted April 21, 2003.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. RODNEY JOSEPH GANT, Defendant.	No. CR-2000-0042 DEFENDANT'S MOTION TO SUPPRESS (Filed Apr. 26, 2000) (Evidentiary hearing required) Hon. Clark Munger, Div. 19

Defendant, Rodney Gant, pursuant to Rules [sic] 16.2 moves the court to suppress the fruit of the search of Mr. Gant's vehicle conducted after his arrest in connection with this case. The search was without probable cause or reasonable suspicion, and was not properly incident to Mr. Gant's arrest. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Rodney Gant was arrested on August 25, 1999, by Tucson Police Officers who believed that he was driving on a suspended license. After his arrest, his vehicle was searched. The search turned up a handgun and a substance believed to be cocaine secreted in a jacket.

In his report, Officer Griffith of the Tucson Police Department set out the circumstances of the arrest. When Mr. Gant drove up, officers were at that location, in the process of arresting a Mr. White on several outstanding warrants. The relevant portions of Officer Griffith's narrative continue at that point:

"As this was happening a white car pulled up that I recognized from the house from our previous contact. The car pulled into the driveway of the house and I shined my flashlight into the drivers area of the car and saw the subject we had previous contact with. That subject was Rodney Gant 120172. When I had run Mr. Gant on the computer earlier it showed that he had a suspended drivers license & an outstanding warrant for FTA from Pima County Sheriff Dept.

"I walked to Mr. Gant's vehicle as he was walking from the vehicle. I called for Mr. Gant by name and he answered. I took Mr. Gant into custody and placed him & [sic] handcuffs. Mr. Gant asked why he was being arrested and I told him for driving on a suspended license. He voluntarily said he knew his license was suspended, but he just had to run to the store. He also said he did have a warrant for driving on a suspended license that he needed to take care of. Mr. Gant was placed in the back of Ofc. Griffin's patrol car.

"Ofc. Nolan #38874 & Ofc. Reed #31440 did a search of Mr. Gant's vehicle incident to arrest."

This report reveals that, at the time of the search, Mr. Gant was out of his vehicle, had been handcuffed, and had been placed in the back of a patrol car. Indeed, the first contact with Mr. Gant occurred while Mr. Gant was walking away from his vehicle. Such a search, therefore is not incident to the arrest.

The seminal case dealing with a search incident to arrest is *Chimel v. California*, 395 U.S. 752, 762-63 (1969), which established the rule that a warrant is not necessary to conduct a search of the person and the area from which an arrest [sic] might gain possession of a weapon or destructible evidence so long as it occurs relatively contemporaneously to the arrest. Although a warrantless search of Mr. Gant's vehicle would have been justified if justified by probable cause to believe that evidence of a crime or contraband was present (U.S. v. Ross, 456 U.S. 798, 804-09 (1982)), because Mr. Gant was arrested for driving on a suspended license, there was no reason to suspect that evidence of a crime or contraband would be gained in a search. The only justification for the search, then, is to look for a weapon.

The particular rule with respect to the search of vehicles for weapons was set out in *New York v. Belton*, 453 U.S. 454 (1981). As to that rule, it has been observed "[t]hat *Belton* unmistakably forecloses all . . . *post facto* inquiries of actual 'reachability' . . . the only question a trial court asks is whether the area searched is generally 'reachable *without exiting the vehicle*, without regard to the likelihood in the particular case that such a reaching was possible." *U.S. v. Doward*, 41

F.3d 789 (1st Cir. 1994) (quoting 3 Wayne R. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.1(c) at 16-17 (2d ed. 1987)) (emphasis in original).

In this case, because Mr. Gant had already exited the vehicle and was walking away from it when first contact was made, and he was handcuffed and secured in the back of a patrol car when the search was conducted, the area searched was in no way reachable by Mr. Gant.

Finally, even if the search for weapons was proper, the seizure of the alleged cocaine was not. In his report, Officer Nolan described the sequence leading up to the seizure of the suspected contraband.

"During my search, I observed a large blue/yellow jacked [sic] on the rear seat. I squeezed the left pocket and felt a substance that crumbled in my hand. Inside the pocked [sic] I located a plastic baggy containing a white powdery substance consistent of powder cocaine." After feeling a substance that crumbled in his hand, officer Nolan obviously knew that he had not located a weapon. Nevertheless, he continued the search without justification and without a warrant while Mr. Gant sat some distance away secured by other officers.

Obviously the state must assert that it did not need a warrant to search Mr. Gant's vehicle; not only because no warrant was obtained, but because no warrant could have been obtained. The only evidence that could have been presented was that Mr. Gant had been arrested for driving on a suspended license, and on a warrant for failure to appear on a charge of driving on a suspended license. Had the officers requested a warrant to search

for drugs or weapons, no magistrate would have granted it. The need to be able to conduct a warrantless search of vehicles is based on the fact that cars are movable, and evidence may be lost while the officers are attempting to obtain a warrant. *California v. Acevedo*, 500 U.S. 565 (1991). That does not mean, however, that a vehicle can be searched without cause. They can be searched to look for contraband where there is reason to believe that contraband is present; and they can be searched where there is a risk that an occupant might reach a hidden weapon. Neither exception to the warrant requirement was present here. Accordingly, the fruits of the search of Mr. Gant's vehicle must be suppressed for the reason that the search was conducted in violation of Defendant's rights under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Arizona Constitution

RESPECTFULLY SUBMITTED this 26th day of April, 2000

/s/ Philip Kimble
Attorney for Defendant

Copy of the foregoing hand-delivered
this 26th day of April, 2000 to:

Hon. Clark Munger
Pima County Superior Court

and faxed to:

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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. RODNEY JOSEPH GANT, Defendant.	No. CR-20000042 **RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS** (Filed May 18, 2000) Hon. Clark Munger Division 19

COMES NOW the State of Arizona, by and through the Pima County Attorney, BARBARA LAWALL, and her Deputy, MARK DIEBOLT, and hereby responds to the Defendant's Motion to Suppress in the accompanying Memorandum of Points and Authorities.

Respectfully submitted this 16 day of May, 2000.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Mark Diebolt
MARK DIEBOLT
Deputy County Attorney
State Bar No. 017202
Pima County Attorney's Office
Law Firm No. 69000

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On August 25, 1999, Officer Griffith responded to 2524 N. Walnut in response to a report of possible narcotic activity. Defendant, RODNEY JOSEPH GANT, answered the door. Defendant told the Officer that the resident would be home later in the evening. After running Defendant's name through a computer, the Officer discovered that Defendant had [sic] suspended drivers license and an outstanding warrant.

Later that day, the Officer returned to the house in an attempt to make contact with the resident. When the Officer arrived at the house, a man sitting in the back yard, who identified himself as Ben White, said that he was waiting for a friend. The Officer later learned that the man's real name was Jackie White. Ben/Jackie informed the Officer that he was dropped off by a female sitting in a vehicle parked in front of the house. Subsequently, the Officer made contact with the female. The female said that she was waiting for a man named "Jack" who was at the house in question. The female voluntarily agreed to let the Officer search her car.

Inside a purse on the floor of the driver's seat, the Officer found a crack pipe containing residue.

Subsequently, Defendant arrived at the house driving a vehicle. As Defendant was walking away from his vehicle, he was arrested by the Officer. The Officer discovered $319 in Defendant's pocket. Officer Reed discovered a handgun in the vehicle. Officer Nolan found a jacket on the rear seat and squeezed the left pocket. Inside the pocket, this Officer felt a substance that crumbled in his hand. When he removed the substance, Officer Nolan discovered cocaine in a bag. Defendant now seeks to suppress all evidence obtained by searching his vehicle. His motion must fail for the reasons set forth below.

LAW AND ARGUMENT:

I. THE OFFICERS HAD PROBABLE CAUSE TO SEARCH THE DEFENDANT'S VEHICLE FOR CONTRABAND.

Because of the inherent mobility of automobiles, and because of the fact that there is a lesser expectation of privacy than in houses, police may search a car without a warrant, but must have probable cause to believe it contains contraband or evidence of a crime. *State v. Walker*, 119 Ariz. 121, 127, 579 P.2d 1091, 1097 (1978). Further, if an officer has probable cause to search a vehicle, he may search the whole car and any containers therein. *U.S. v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Since a car is "readily mobile," it can be searched once the officers have probable cause, and there does not need to be any showing of additional

exigency. *Pennsylvania v. Labron & Kilgore*, 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996).

In the case at bar, the Officers had probable cause to search the vehicle. Defendant was present at a house suspected of narcotic activity. Before Defendant returned to the residence in his car, the Officers discovered a man in the backyard who lied about his name. A woman with a crack pipe containing residue was waiting for the man in front of the house. These facts, when viewed together, gave the Officers reason to believe that the house is used for selling drugs. To use a house for selling drugs, one must transport drugs or drug making materials to the house. Because Officers reasonably believed that people were waiting at the house to purchase illegal drugs, they had reason to believe that anyone arriving at the scene was transporting drugs. This conclusion is made more probable by the lage [sic] amount of cash discovered on Defendant's person. Consequently, the Officers had probable cause to search the inside of the vehicle where they discovered a weapon and cocaine.

II. THE OFFICER'S SEARCH OF DEFENDANT'S VEHICLE WAS VALID AS IT WAS INCIDENT TO A LAWFUL ARREST.

A law enforcement officer may search a vehicle after lawfully arresting an occupant of that vehicle. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). While the reason at the time of *Belton* for allowing the search incident to arrest was "to ensure the safety of the officer and protect evidence from being intentionally destroyed," *State v. Hanna*, 173 Ariz, 30, 32, 839 P.2d 450, 452 (App. 1992), the *Belton* decision

allows searches even when there is little likelihood of an officer being endangered or evidence being destroyed. Such searches are justified by the inherent mobility of cars.

The Court in *United States v. Doward* wrote, "*Belton* upheld a warrantless search of the entire 'passenger compartment' against a claim that all its occupants were outside the vehicle at the time of the search – thus, as a practical matter, no longer within 'reach' of any weapons, evidence or contraband located within the passenger compartment." 41 F.3d 789 (1st Cir. 1994). In other words, an officer may search the inside of a vehicle when arresting the occupant even if the occupant exits the vehicle prior to the search.

In the case at bar, like in *Belton*, the defendant was arrested for a crime committed inside of a vehicle which was discovered by the officer while the perpetrators were located inside the vehicle. Also like in *Belton*, the evidence in question was discovered inside the passenger compartment. Consequently, under *Belton*, the search in the case at bar was legally performed incident to Defendant's arrest.

For the foregoing reasons the State respectfully requests that this Court deny the Defendant's Motion to Suppress the Evidence.

Respectfully submitted this 16 day of May, 2000.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Mark Diebolt
MARK DIEBOLT
Deputy County Attorney
State Bar No. 017202
Pima County Attorney's Office
Law Firm No. 69000

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Hon. Clark Munger
Division 19

/jdm

ARIZONA SUPERIOR COURT, PIMA COUNTY

CASE NO. **CR-20000042**

DATE: MAY 22, 2000

JUDGE:
HON. CLARK MUNGER

COURT REPORTER:
Cheryl Austin

STATE OF ARIZONA — Mark Diebolt

VS.

RODNEY GANT — Philip Kimble

MINUTE ENTRY

(Filed May 22, 2000)

HEARING RE MOTION TO SUPPRESS:

Defendant present in custody.

Court and counsel briefly discuss the facts in this case.

Mr. Kimble and Mr. Diebolt present oral argument to the Court.

For reasons stated by the Court on the record, the Court believes at this time that the Court will deny the Motion to Suppress after counsel present further memoranda to support their positions.

cc: Hon. Clark Munger
Criminal Calendaring
County Attorney – M. Diebolt
Sheriff
Philip Kimble, Esq.

/s/ Mary Bailey
Deputy Clerk

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. RODNEY JOSEPH GANT, Defendant.	)	Case No. CR-20000042 2 CA-CR 00-0430

Monday, May 22, 2000
Tucson, Arizona

OFFICIAL COURT REPORTER'S TRANSCRIPT

MOTION TO SUPPRESS

(Filed Jan. 5, 2001)

BEFORE: THE HONORABLE
CLARK W. MUNGER, JUDGE

APPEARANCES:

For the State:

MARK DIEBOLT, Esq.
Deputy County Attorney

For the Defendant:

PHILIP KIMBLE, Esq.
Attorney at Law

Cheryl Cesare, CSR, RMR
OFFICIAL COURT REPORTER
Pima County Superior Court
Tucson, Arizona

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[3] PROCEEDINGS

THE COURT: State vs. Grant – Gant, pardon me, CR-20000042.

MR. DIEBOLT: Your Honor, Mark Diebolt appearing on behalf of the State.

MR. KIMBLE: Good afternoon, your Honor, Philip Kimble for Mr. Gant, present, in custody. Your Honor.

May my client sit at counsel table with me?

THE DEPUTY: Yeah.

THE COURT: Yes.

This is defense motion to suppress. I have read the respective briefs. It doesn't sound as though we have any 9th Circuit or Arizona case that's just exactly right on point, here.

Is that counsel's belief also?

MR. DIEBOLT: Can I have just one second, Judge?

MR. KIMBLE: Your Honor, the defense is not aware of a controlling Arizona 9th Circuit case that we would consider directly on point.

THE COURT: Okay.

MR. DIEBOLT: And, your Honor, the only 9th Circuit case is *State vs. McLaughlin*. – *State* [4] *vs. McLaughlin*, 175 F.3d 889, just talking about automobile search commencing five minutes after the defendant has been arrested or removed from the scene.

THE COURT: All right.

MR. DIEBOLT: They agree that the search in that case occurred during a continuous series of events closely connected in time to the event so, therefore, it was a valid search.

THE COURT: Are any of the facts in issue? It seemed to me that from your respective briefs, that there didn't seem to be any disagreement. As I understand the facts – and let me repeat what I understand they are: That this arose out of a report of possible narcotic activity; police went to the – police went to the residence, knocked on the door. The defendant answered, but told them apparently that he was not –

Are these potential witnesses?

MR. DIEBOLT: They are, your Honor. Both police officers.

THE COURT: Maybe it would be appropriate that they are not here while I reiterate what I understand the facts to be.

MR. DIEBOLT: That's fine. Okay. The [5] only reason I'm keeping them, if they want to clarify the Court the different –

THE COURT: Well, I'll leave that up to the two of you to clarify by testimony. Okay?

MR. DIEBOLT: Okay.

THE COURT: That they ran a computer check on Rodney Joseph Gant and found that he was wanted on a suspended driver's license and, also, an outstanding warrant for failure to appear.

MR. DIEBOLT: Yes, sir.

THE COURT: They came back – they left and then came back to the residence, found a man and a woman around the residence. The woman had a crack pipe. The man, they didn't apparently find any contraband on him. Then the defendant arrived, driving a vehicle, and the officer, as the car pulled into the driveway, shined his flashlight into the car, recognized Mr. Gant as the individual he had previously met at the door and identified him as Mr. Gant.

And as the officer was walking toward the vehicle, Mr. Gant got out of the vehicle and started walking toward the officer when the officer called him by name, and he responded that that was who he was. And the officer took him in custody for the [6] outstanding warrant and suspended driver's license, having seen him operating a motor vehicle. So he – there's no question that he could legally arrest and did lawfully arrest the defendant on the outstanding warrant and for operating a motor vehicle without a driver's license.

Mr. Gant was removed from the vehicle – from the vicinity of the vehicle to the officer's patrol car and placed in the back of the patrol car, and the officers then did a search of the defendant's vehicle, found a weapon and found the jacket. And, apparently, feeling the jacket, felt something that they felt might be drugs and took it out of the pocket and found cocaine.

Is there any disagreement with –

MR. KIMBLE: I believe – again, not yet having interviewed the officers and relying on their reports, those are the facts that I recited in my motion.

THE COURT: Okay.

MR. KIMBLE: And I believe those – those are consistent. I'm not aware that the State has any disagreement with any of those. And I am willing to base my motion on those assertions of facts in the reports.

[7] THE COURT: Okay. Mr. Diebolt, do you have anything – any disagreement with the version of the facts?

MR. DIEBOLT: I have no disagreement, Judge.

THE COURT: All right. Do we need the officers, then, for testimony?

If you want to, that's fine.

MR. KIMBLE: I do not. If –

MR. DIEBOLT: I just subpoenaed them in case we had to have them. I didn't want to get caught without having witnesses.

MR. KIMBLE: Sure. I think I would be entitled, if there was some issue about the facts.

THE COURT: Absolutely. If you want them.

MR. KIMBLE: But if the State concedes those are the facts, I think those are facts sufficient to proceed on the motion.

THE COURT: All right.

MR. DIEBOLT: I have no disagreement with the facts. I'd be happy to submit, also, on my pleading as well.

THE COURT: All right. Okay. Then I think we can tell the officers – wait for Mr. Gant to talk with his attorney.

[8] (Attorney-client discussion.)

MR. KIMBLE: I'm sorry, your Honor.

THE COURT: If there's no need for testimony, we can tell the officers they're free to go.

MR. KIMBLE: I have no objection.

MR. DIEBOLT: May I ask just ask, procedurally, where we're going to go at this point? I'm just curious as to –

THE COURT: Well, I'd like to hear oral argument from you.

MR. DIEBOLT: Okay. Is there any – since they are here –

THE COURT: Well, we'll have them wait. That's fine.

MR. DIEBOLT: Just for the period of time it's going to take to resolve it.

THE COURT: All right.

MR. KIMBLE: Your Honor.

THE COURT: Yes, sir.

MR. KIMBLE: May I inquire of counsel if the case cited is one cited in your response?

MR. DIEBOLT: The *McLaughlin* case?

MR. KIMBLE: Yes.

MR. DIEBOLT: I was looking. I don't [9] believe it's in my response.

MR. KIMBLE: If the Court would like it – sounds like it might be more on point than anything I found. If the Court would like any further argument on that after this, I'd be happy to review it and provide supplemental.

THE COURT: If you want to take a look – is it *McLaughlin, McLaughlin.*

MR. DIEBOLT: *U.S. vs. McLaughlin.*

THE COURT: Do you want to review that and submit a Reply and submit it on –

MR. KIMBLE: I might if the Court would permit. I just don't know.

THE COURT: Certainly.

MR. KIMBLE: Whether the facts are distinguishable or if they're helpful or whatnot. I haven't read the case yet myself.

MR. DIEBOLT: And, your Honor, I only just found that looking through a different source that I don't – I had to get a copy from my supervisor.

THE COURT: And what – again, what's the cite?

MR. DIEBOLT: It's *U.S. vs. McLaughlin*, M-c-L-a-u-g-h-l-i-n, 170 F.3d 889, 891, pages, 9th Circuit, 1999.

[10] THE COURT: Okay. I will take a look at that.

MR. KIMBLE: Your Honor, the justification of the search in this case is always incident to an arrest. And certainly that's the only reason it could have been justified because there was no warrant, there's no reasonable suspicion.

THE COURT: I don't think they had probable cause to arrest on a drug charge, and I think that was the thrust of your argument. And the State has argued that, well, they didn't have probable cause to arrest on a drug [sic]. I don't think they did.

MR. KIMBLE: You know, and I don't even see any – they did not even claim that they were arresting on that basis. They were claiming they were arresting because they saw him driving. And that, apparently, would be a misdemeanor occurring within the vision of an arresting officer.

Now, interestingly – I have to question whether or not there was a pretextual reason for the arrest, because they had justification for an arrest previously based on the fact that they were aware when they were there previously that Mr. Gant had – had an outstanding warrant, not having seen him [11] driving. And whether it's out of the goodness of their hearts that they did not arrest him at that time or they were seeking some further pretext, I don't know. And I don't know whether or not even testimony on that point would be salient to a decision by the Court, because what think [sic] I think is important is what happened when Mr. Gant was arrested, is he pulled up, at some point they determined that it was him driving. Either as he was driving up or when he got out or at some point they determined it was him. Based on the previous contact, they were aware he was not supposed to be driving and he was. The contact they had with him is outside the vehicle. The vehicle was not in a place where it was obstructing traffic. He was parked at a private residence.

This is an arrest for a misdemeanor, and, presumably, additionally on failure to appear, which I believe either – I do not believe there was an indication of what the failure to appear was. Obviously, it's reasonable to assume it was for a misdemeanor since they did not arrest him previously. And my supposition is that it was for a driving-on-a-suspended, although I don't know if that is even in the reports, and it's not even clear [12] whether or not the officers were aware that they were – the nature of the failure to appear. In any case, they were arresting him on a misdemeanor when he is away from the vehicle, where there was no need to secure the vehicle, when the vehicle is locked.

Now, a search incident to arrest is necessary to prevent the loss of evidence or contraband, where there is reason to believe that the person would be a suspect. An arrest for driving on a suspended license has no inference or cause to believe that there would be drugs, instrumentalities of criminal activity, contraband, or anything of evidentiary value in the vehicle that the defendant left; therefore, the only real justification is search for weapons.

There, you get in a couple of problems. One, sure, they can search him and they can search an area within his control for weapons. They can even probably search areas in a car that are not readily immediately accessible to him if it's incident to the arrest. But at the time the vehicle was searched, Mr. Gant was under arrest. He was removed from the area, he was secured in the back seat of a patrol car, and he was not even initially contacted until he was away from the vehicle. So he [13] had no more connection to anything – any weapon that might be in that vehicle than any other person walking by, because he had no access to that vehicle at the time it was searched.

Second problem is the officers searched this jacket they find in the back of a car. Now, they feel something that they – the officer that searches feels something that they perceive could be a weapon, and it turns out to be a gun. The officers say they feel something else – he feels something else crumbling.

Now, if what we're talking about is a legitimate search for contraband, there would be an argument that one would expect something, cocaine or some other illegal substance to be crumbly, like that, on supposition that probably people aren't carrying flour in their pockets. But it is not searched for that purpose because there's no

reason to suspect that there were drugs involved in this arrest since it was an arrest for driving on a suspended license.

If it can only be justified a search for officer safety reasons, when they feel something crumbly, now it's not a weapon and the search can go no further. They continue to search either on the [14] justification or the belief they have a legitimate right to search for drugs and find the contraband that, then, become the basis of the charge here.

Mr. Gant did not have access to it, so it was not a legitimate search for [sic] weapon. Even if it was a legitimate search for a weapon, they knew it wasn't a weapon as soon as they felt it, yet continued with the search.

Therefore, for both of those reasons, it's an improper search not incident to his arrest for misdemeanor driving on a suspended license.

MR. DIEBOLT: Thank you, your Honor.

First of all, as everyone is aware, and I want to just reiterate that, automobiles have a lesser expectation of privacy than a home. Obviously, they're treated differently. I want to jump ahead under case law, your Honor, *New York vs. Belton*, when a policeman has made a lawful custodial arrest, that police officer, contemporaneously to that that [sic] arrest, may search the passenger compartment of that automobile. It doesn't say he has to search for any particular item. He may – he or she may search the compartment of the car and any containers therein, and he may open those containers and look into those containers.

[15] So let's just talk about the jacket. That's what we're going toward is the jacket.

I want to bring out in *State vs. Milton – United States vs. Milton*, the Supreme Court held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he, contemporaneous to that arrest, may search the passenger compartment of the automobile. Under *Belton* the police may also examine the contents of any containers found within the passenger compartment. "Container" as defined in *Belton*, you know, include [sic] the glove compartment, et cetera. *Belton* applies even if the arrestee has been separated from the vehicle prior to the search of the – of the compartment that they're talking about.

Jumping ahead to State – *U.S. vs. Woody*, W-o-d – W-o-o-d-y, the Supreme Court has articulated two reasons which justified the warrantless search of an automobile: first, to uncover weapons, in this case a weapon was uncovered; two, to prevent the disappearance or destruction of evidence of a crime. Certainly, if those officers had not found that – I believe my information is 13.6 grams of powder cocaine, that [16] evidence could have easily been destroyed, taken away, or removed from that vehicle. Thus, an arrest of the occupant of the car justifies an automobile search of the car's passenger compartment, regardless of whether the officer's [sic] effecting the arrest reasonably believe the arrestee to be rust [sic] or within reach of a weapon. And that is *State vs. Woody*.

I can give the cite if you want. Police thus have a right to search the car's passenger compartment, including open and closed containers, irrespective of any privacy interests the car's occupants might have to their belongings. And I would certainly submit to the Court that a coat or jacket, in this case, would fall within closed container description.

The last one I want to bring to the Court's attention is defense counsel mentioned that he was away from the car. *McLaughlin* addresses that, and I just mentioned *McLaughlin* today, and it wasn't mentioned in my cites. If defense needs more time, I respect that. But *McLaughlin*, again, talks about the *Belton* bright line rule, that they may search a compartment. And they agree that it doesn't have to be done at the exact second. A [17] person can be removed, placed away, placed under arrest, and the officer can then go back and search the car and – although other search privileges, if you will, that the officer has are still valid.

And based on all that case law, I would submit everything else to the Court on the pleadings.

MR. KIMBLE: Part of the problem here is that Mr. Gant, when he was arrested, was away from the car. This is not a situation where the police pull someone over, effect an arrest, essentially, of the person in the car, remove them from the car, and then search it. He was as removed from the – from that car as I am from my truck, which is parked in the parking lot.

Now, I don't think anybody would argue that if the deputy arrested me here, that there would be justification to go search my truck. I am removed from it. And Mr. Gant was removed from his car before the first contact was made with the officers. He's walking away, as it says in the report, and they come up to him. So they are making an arrest of him, essentially, out in public, not in the vehicle.

And it's being realistic – it's clear why [18] the officers have to say they're making this search incident to the arrest. One, they could have gotten a warrant or they

could have tried to get a warrant, and it's because, obviously, they were watching the premises. They were back there twice. So it's not as if they're making a stop on the highway, and if they don't search now they don't have an opportunity to search. If they thought they could get a warrant, they could call a judge or a magistrate, get a warrant while they're sitting there waiting.

It's clear why they didn't do that, because no judge or magistrate would give them a warrant. If they said, we saw this person driving up to his house, we think that some illegal activity might be going on and we arrested him for driving on a suspended license, would you then give us a warrant to search his car for drugs or weapons?, a judge is going to say no. There is no reason to suspect that somebody driving on a suspended license up to a house – up to a house, not away from the house, even where you suspect illegal activity is going on, would have drugs or weapons.

So they have to say it's incident to an arrest to get around the warrant requirement. The problem is the exigency really goes to whether or [19] not he needed the warrant, not whether or not you should be able to search. Here Mr. Gant was separated from the car before the contact occurred. They had no reason to search for drugs, even if they had reasons to search for weapons. He was away from it by the time they had contact with him. And when they found something, they knew it wasn't a weapon, they continue to search, and that's not what's permissible. Thank you.

THE COURT: I think I need to deny the motion for two bases – two reasons: One, the officers clearly saw Mr. Gant operating a motor vehicle when they knew he

didn't have a license, so they saw him committing a crime; Mr. Gant got out of the vehicle. Had they walked – had the officers walked a little faster and gotten to the vehicle before Mr. Gant got out, I don't think there's any question they could search anywhere in that vehicle. He's in the vehicle. Anything within the passenger compartment, locked or unlocked, can be searched for weapons, drugs, anything.

The fact that Mr. Gant was fast enough and clever enough to get out of the vehicle I don't think limits the officer's ability to search the vehicle when they were arresting him for an illegal [20] operation of the vehicle. They saw him operating it against the law. They clearly had the ability to search for weapons even if – and I think that's so even if he was outside the vehicle. Once they found the weapon, I think then they had probable cause to search further.

And I think they could have gotten a warrant at that point based on the facts as the officers knew them to be once they found the weapon in the vehicle. They could, at that point, have called a judge and have gotten a search warrant to search for illegal contraband, given the fact that they found somebody waiting at the residence who had a crack pipe. They had another individual sitting in the back yard for no apparent reason. They apparently had some information that there was narcotic activity going on at the house. And also given the fact Mr. Gant had told them that the resident was out and would be coming back later, which would appear to have been a lie to the officers, they may have – I don't know whether he was trying to mislead them or what, but I think under – I don't think he can limit the scope of the search by vacating the car faster than the officers can get up to the car.

[21] I don't think, for instance, that the scope of the search is limited by how fast the defendant can run. Once the officers saw him in the vehicle, I don't think it's a foot race to see whether the officers can get to the vehicle before the defendant steps out and walks a few steps away from the vehicle. And I think that's what the effect of granting the motion would be, is to say that the defendant controls the scope of the search by how fast he can walk or run.

Now, I'd be glad to look at the *McLaughlin* case, but it sounds to me as if that tends to come down on the side of the Government here. But if you want to submit Memorandum, I'd be glad to listen – to read them. I wanted to tell you where my thought processes are right now. If you want to submit further Memorandum, I'd be glad to take a look at them.

MR. KIMBLE: Your Honor, if I could have an opportunity, you know, to at least do so, if you feel it would be of assistance to the Court, if the Court would give me a couple days to do that.

THE COURT: Certainly. How is – this is the 22nd of May. How is this Friday?

MR. KIMBLE: That's fine. And what I can [22] do is I can inform the Court if I feel that no further briefing is needed.

THE COURT: If I intend to still deny the motion, I will simply say Motion is denied for the reasons set forth before in court rather than write out a full opinion.

MR. KIMBLE: Very good. May I just, for the record, make further argument –

THE COURT: Certainly.

MR. KIMBLE: – regarding the Court's –

THE COURT: Absolutely.

MR. KIMBLE: – issues?

The issue about whether Mr. Gant – the method which Mr. Gant is leaving the vehicle I think is addressed in the actual report by Officer Griffith, who states, I watched Mr. Gant's vehicle as he was walking from the vehicle, which I suggest does not indicate some sort of foot race on either part to try to thwart the officer or the officer to thwart Mr. Gant's exit from the vehicle.

It appears, rather, that the circumstances are such that Mr. Gant was leaving the vehicle, having parked the car where he intended to end his journey, not a situation where somebody is being pursued by a vehicle, stops, gets out, and runs away [23] from the vehicle as part of pursuit. This is an individual who has voluntarily left the vehicle not knowing that he is going to be arrested, not suspecting that the officers have any intention of detaining him or searching his vehicle. So it is not that he is doing anything, I believe, to thwart the officers by the method of his departure.

I think there is no more justification than if the officers, having seen the officers, were at Dunkin' Donuts, and across the street they saw somebody pull up who they personally knew had a warrant out for them, get out of his vehicle, go into a bar; the officers finish their coffee and donuts, and then later decide to go over and arrest the individual and say, You know what?, we're going to search the vehicle as well; there, I think, just as much as in this

case. The individual had removed himself from the vehicle absent the intervention of law enforcement.

And I think it makes a distinction because I think these other cases – and I'll look up *McLaughlin* as to this particular point – deal with where the officers have made the stop or have initiated the contact with the defendant, is aware is being initiated while the defendant is in contact [24] with the vehicle. And that, therefore, there's reason to think that the defendant may have done something in connection with the vehicle, secreted a weapon, done something with evidence that they would have to address.

That's my further record, and I'll brief further if I deem appropriate.

THE COURT: I appreciate it. Thank you. Anymore [sic] the State wants to add?

MR. DIEBOLT: No, your Honor. Thank you.

THE COURT: Thank you. I'll look forward to the memo.

MR. KIMBLE: Thank you, your Honor.

(Proceedings concluded.)

[25] CERTIFICATE

STATE OF ARIZONA,)
) ss.
COUNTY OF PIMA)

I, Cheryl Cesare, do hereby certify that as an Official Court Reporter for the Pima County Superior Court, I

reported the foregoing proceedings to the best of my skill and ability; and that the same was transcribed under my supervision via computer-aided transcription; and that the foregoing pages of typewritten matter are a true, correct, and complete transcript of all the proceedings had as set forth in the title page hereto.

/s/ Cheryl L. Cesare
CHERYL CESARE, CSR, RMR
CSR No. 10318 (CA)
Official Court Reporter

Jan. 2, 2001
date

My Commission Expires:

January 31, 2002

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE:
HON. CLARK MUNGER CASE NO. **CR-20000042**

COURT REPORTER: NONE DATE: June 5, 2000

STATE OF ARIZONA

VS.

RODNEY JOSEPH GANT

MINUTE ENTRY

(Filed June 5, 2000)

IN CHAMBERS RULING ON MOTION TO SUPPRESS:

Pursuant to the Court's minute entry of May 22, 2000, the Court notes that Counsel have not filed supplemental memorandum, therefore,

IT IS ORDERED the Motion to Suppress is **DENIED**.

cc: Hon. Clark Munger
Criminal Calendaring
County Attorney-Mark Diebolt, Esq.
Philip Kimble, Esq.

/s/ Mary Bailey/MM
Deputy Clerk

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with the State's assertion of its immunity and its dismissal from the suit on that basis. Indeed, by invoking its sovereign immunity, the State expressly disavowed any waiver of its immunity.

Given that the State preserved its immunity by filing a motion to dismiss on Eleventh-Amendment grounds and obtaining such a dismissal, it cannot be said that the State unequivocally expressed a consent to be sued in federal court. Moreover, defensive litigation conduct on behalf of defendant state officials does not function as consent to suit. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 547 (2002); *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394 (1998). The State did not voluntarily initiate this action, voluntarily become a party to this action through intervention, or voluntarily file a claim in this action. *Cf. Gardner v. New Jersey*, 329 U.S. 565 (1947); *Clark v. Barnard*, 108 U.S. 436 (1883). And unlike the situation in *Lapides*, the state agencies and state health officials in this case did not elect a federal forum. Rather, they were brought into federal court involuntarily as defendants. Accordingly, this case does not come within the "general principle" recognized in *Lapides* of voluntary invocation of federal-court jurisdiction.

b. Voluntary consent cannot be given in an *Ex parte Young* case because the State is not a party.

The actions relied upon by Frew to make her case—the general course of conduct by the state-official *Young* defendants over a period of years—do not constitute a clear and unequivocal waiver of the *State*'s sovereign immunity. Frew's inability to identify a particular point in time at which the purported waiver occurred confirms the indefiniteness and ambiguity of the waiver that she advances. The conduct cited by Frew in this case was not "unequivocal" evidence of consent to suit so as to "leave no room for any other reasonable construction." *Edelman*, 415 U.S., at 673.

Indeed, the very premise of a *Young* suit precludes the necessary clarity of any waiver. The *Young* fiction allows state officers to be sued by deeming their conduct in violation of federal law to be *ultra vires* and therefore not the State's. But jurisdiction extends only so far as to allow for prospective injunctive relief; it does not entitle them, in defending that litigation, to waive Eleventh Amendment immunity altogether and render *Young* (the fictive vehicle of federal-court jurisdiction) irrelevant. Indeed, all three of the "affirmative invocation" cases relied upon by Frew—*Lapides*, *Gardner*, and *Clark*—were not *Young* suits, but suits prosecuted by or against the State itself, for only the State can waive its Eleventh Amendment immunity. *See Lapides*, 535 U.S., at 616; *Gardner*, 329 U.S., at 569-70; *Clark*, 108 U.S., at 447-48.[28]

Moreover, were the law to change, the States have had no warning that entry into consent decrees in *Ex parte Young* suits could constitute a waiver of immunity. To attribute waiver to unsuspecting States whose state officials have already entered into consent decrees would comport with neither the Court's insistence on a knowing waiver of immunity nor the Court's customary indulgence of every reasonable presumption against waiver. *See Coll. Sav. Bank*, 527 U.S., at 682; *see also Lapides*, 535 U.S., at 624 (noting Justice Kennedy's observation in *Schacht* that "once the States know or have reason to expect that removal will constitute a waiver," then removal could be regarded as a voluntary invocation of federal jurisdiction); *Schacht*, 524 U.S., at 397 (Kennedy, J., concurring).

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28. Frew also relies on *Gunter* to support her argument that the State invoked the jurisdiction of the federal court. *See* Pet'r Br., at 21. *Gunter* was a suit against a state officer, not the State, but *Gunter* never extended beyond the boundaries of *Young*: plaintiffs sought only prospective injunctive relief, both before and after the deemed waiver, and the extent of that relief was only to enjoin ongoing violations of federal law found after a full adjudication on the merits. 220 U.S., at 292.

c. The language of the decree does not reveal a waiver.

The language of the consent decree fails to evince consent by the State to suit in federal court. The provisions of the decree relied upon by Frew state that "[t]he term 'will' creates a mandatory, enforceable obligation," and that "the parties may request relief from [the district court]" if the "Defendants' future activities [do not] comport with the terms and intent of this Decree." Lodging, ¶¶302, 303. By their own terms, these provisions fail to establish a clear and unequivocal intent by the State to waive its immunity. Indeed, they do no more than define a term and acknowledge that the parties "may request relief" from the district court; they do not purport to determine whether that relief will be available, which remains constrained by the limitations of *Ex parte Young*.

Paragraph 303—the sole basis of Frew's belated argument before the court of appeals—reveals no unequivocal expression of waiver. That provision appears in a "miscellaneous" set of provisions at the close of the decree, and its acknowledgment that the parties "may request relief from" the federal court does not declare that the State waived its immunity or any other affirmative defense to all types of relief a party might request in the future. Indeed, ¶303 does not even mention sovereign immunity or the Eleventh Amendment, nor are they the subject of any surrounding provisions.

Frew's argument is further undermined by ¶301's statement that "[p]laintiffs do not concede the validity of Defendants' defenses," which implicitly acknowledges that the State preserved defenses notwithstanding agreement to the decree.[29] If ¶302 and ¶303 represented the parties'

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29. Frew and the U.S., also erroneously place substantial reliance on ¶302's statement that "[t]he term 'will' creates a mandatory, enforceable obligation." *See, e.g.*, Pet'r Br., at 27; U.S. Br., at 15. In any

understanding that the State was waiving its immunity from suit, as Frew advances, ¶301 would have specifically referenced waiver of Eleventh Amendment immunity. Because the meaning of a decree's provisions must be discerned in light of the entire decree, ¶301 reveals the implausibility of Frew's reading of ¶302 and ¶303. At a minimum, the tension between ¶301, ¶302 and ¶303 creates an ambiguity that precludes an inference of waiver. *Coll. Sav. Bank*, 527 U.S., at 682.

3. *Lapides* did not alter the requirements for a State's consent to suit in federal court for federal-law claims.

Lapides's removal holding did not establish a new waiver standard under the Eleventh Amendment. Rather, the Court's analysis rested on the same principles of clear and unequivocal consent that inform all valid waivers of sovereign immunity. Frew incorrectly reads the Court's decision in *Lapides* as a broad license to imply waivers of sovereign immunity from litigation conduct. The Court, however, expressly limited its waiver-by-removal holding to the narrow "context of state-law claims, in respect to which the State had explicitly waived immunity from state-court proceedings." *Lapides*, 535 U.S., at 617; *id.*, at 617-18 (explaining that the Court was not "address[ing] the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not

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event, ¶302 cannot be read in isolation. *Cf. Armour*, 402 U.S., at 681-82. It must be read in conjunction with ¶301's provisions that (1) "[p]laintiffs do not concede the validity of Defendant's defenses," (2) "[d]efendants do not concede liability," and (3) "[t]his Consent decree represents the parties' attempt to resolve many of the issues in this litigation amicably . . . without the need for the Court's intervention." Read together, these provisions cannot comprise a clear expression of an intention on the part of the State to submit itself to the jurisdiction of the district court.

been waived or abrogated in state court"). Contrary to Frew's suggestion, the Court in no way altered the requirements for a State's consent to suit in federal court for federal-law claims.

Frew's suit does not fit within *Lapides*'s rubric because no removal occurred and because this case does not involve a claim—state or federal—for which the State's "underlying sovereign immunity" has been waived (*i.e.*, by state statute) or abrogated (*i.e.*, by Congress through §5 enforcement powers) in state court.[30] In any event, the only question in *Lapides* was which *forum* could adjudicate the suit in light of Georgia's statutory consent to tort suits in state court *coupled with* Georgia's removal of the suit to federal court. Given that Georgia already had waived its underlying sovereign immunity through a statute, the State's removal was deemed sufficient to invoke federal jurisdiction and, therefore, waive the *forum* immunity otherwise afforded by the Eleventh Amendment. *See Lapides*, 535 U.S., at 624; *cf. Pennhurst*, 465 U.S., at 99 (requiring a State's express consent to suit in federal forum regarding claims for which underlying sovereign immunity is waived in state court).

In other words, the States possess two types of sovereign immunity. First and foremost is the States' constitutional sovereign immunity, which inheres in the Nation's framework and emanates from the States' sovereign status. *Alden*, 527 U.S., at 728-29. Second, included within that sovereign immunity is a specific immunity from suit in a federal forum—which the

30. No Texas statute consents to Medicaid suits in state court. And Congress did not validly abrogate the State's sovereign immunity from suit under the Medicaid Act. *See Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147 (1981).

Eleventh Amendment's text confirms. *Id.*; *see* U.S. CONST. amend. XI. Thus, Eleventh Amendment "forum immunity" is but one aspect of the underlying sovereign immunity that prevents a State from being sued—at all—in any forum.[31] *See Alden*, 527 U.S., at 728-29.

Even if *Lapides* were extended to federal claims for which no legislative consent exists—which the Court should not do—the only waiver would be of forum immunity. Texas's underlying constitutional immunity would remain intact because the Texas Legislature has not consented to Medicaid suits and the State's "constitutional right not to be sued at all," U.S. Br., at *22, *Lapides* (No. 01-298), would bar the enforcement action even if forum immunity did not.

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31. The forum-immunity concept was crystallized in a brief submitted by the United States as *amicus curiae* in support of Petitioner Lapides, which emphasized the limited nature of the waiver that occurred when Georgia removed Lapides's suit:

> "Although a State's removal of a case effects a waiver of its immunity from suit in a federal forum, there are significant limits on the scope of that waiver. The Eleventh Amendment incorporates two forms of immunity. A State may choose not to be sued at all, or it may choose to be sued, but only in its own courts. *Pennhurst*, 465 U.S., at 99. A removal of a case to federal court waives only *forum immunity*. By voluntarily and affirmatively selecting a federal forum for litigation of a case, the State consents to have a federal court rather than the state court decide the case. The act of removal, however, cannot be understood to waive any defenses that would have been available to the State in state court. The constitutional right not to be sued at all is just such a defense." U.S. Br., *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 2001 WL 1643411, at *22 (Dec. 20, 2001).

C. An Assistant Attorney General's Representation of State Officials in Negotiations and Proposal of a Consent Decree Cannot Be Regarded as the Consent of the Sovereign.

1. The Attorney General for the State of Texas is not authorized to waive the State's immunity from suit in federal court.

Frew erroneously urges the Court to construe the negotiation and proposal of the consent decree as an implied consent by the State to federal court jurisdiction. But the type of constructive or implied consent Frew proposes cannot support a waiver of Eleventh Amendment immunity because: (1) this Court has repudiated the constructive-waiver doctrine, *see Coll. Sav. Bank*, 527 U.S., at 680; and (2) any alleged implied waiver was not authorized under state law. In *Ford Motor Co. v. Department of Treasury*, the Court determined that a state official's ability to consent to suit turned on the "power under state law to do so," and that immunity from suit could not be waived by the litigation conduct of an executive officer who lacked the authority to effectuate such a waiver. 323 U.S. 459, 467 (1945). Although, in *Lapides*, the Court overruled *Ford* in the context of an attorney general's removal of state-law claims for which the state had consented to suit in state court, the Court expressly stated that it was overruling *Ford only to the extent* that it was inconsistent with *Lapides*'s narrow waiver-by-removal rule. 535 U.S., at 622. In this case, *Ford*'s holding remains vitally important because the state officials involuntarily found themselves in federal court and because neither the assistant attorneys general representing the state-official defendants, nor the defendants themselves, are empowered to contract away legislative powers such as the authority to make policy and budgetary decisions for the State's EPSDT program.

Although, as emphasized by Frew and her *amici*, whether a "particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity" is a "question[ ] of federal law," 535 U.S., at 622-23, the Court has never suggested that state laws and rules should not be consulted in making that determination. Indeed, the Court has explained that the ultimate "federal question can be answered only after considering the provisions of state law." *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 428 n.5 (1997) (cited with approval in *Lapides*, 535 U.S., at 623).

To be sure, the Court in *Lapides* did scale back the reach of *Ford*'s holding that state law defines the limits of state officials' authority to offer consent to suit in federal court. The Court concluded that *Ford* was inconsistent with the principle of voluntary invocation of federal jurisdiction and overruled *Ford* "insofar as it would otherwise apply." *Lapides*, 535 U.S., at 622 (explaining that *Ford* did not apply because the State had "*voluntarily* invoked the jurisdiction of the federal court," and it had not been "*involuntarily* made a defendant in federal court"). *Ford*'s establishment of the limits of state officials' authority, however, retains force in this case because none of the defendants voluntarily came to federal court.

Texas law makes clear that neither the Attorney General nor the defendant state officials can waive the State's immunity. Only the Texas Legislature can waive the State's sovereign immunity.[32] *See, e.g., Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *Gen. Servs. Comm'n v. Little-Tex Insulation*

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32. Frew does not suggest that the state officials had the authority to waive the State's immunity. Nor could she. The defendant officials' authority is limited to "responsibility for ensuring the delivery of state health and human services," TEX. GOV'T CODE §531.002, and "administer[ing] and enforc[ing] the health laws of this state under the board's supervision," TEX. HEALTH & SAFETY CODE §12.021.

Co., 39 S.W.3d 591 (Tex. 2001). Indeed, the Texas Legislature has expressly disclaimed any authority for the Attorney General to waive immunity from suit: "An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state." TEX. GOV'T CODE §402.004; *see also League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 840 (CA5 1993) (stating that the Attorney General "cannot bind state officials, his clients, to his own policy preferences").

Despite Texas law establishing that the Texas Attorney General lacks authority to waive the State's Eleventh Amendment immunity, Frew claims that mere empowerment to represent the State in litigation means that the Attorney General enjoys authority to waive the State's immunity. Pet'r Br., at 29-30. Frew's argument, however, is directly refuted by *Ford*, which rejected the notion that the powers conferred on a state attorney general "to appear and defend actions brought against the State or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued." 323 U.S., at 468. And *Ford*, for claims where state defendants were involuntarily haled into federal court, remains good law.

Aside from this discredited authority theory, Frew's only other alleged source of Attorney General waiver authority is an implied power from the Texas Attorney General's authority "to propose" settlements in litigation. *See* Pet'r Br. 30 & n.18 (quoting *Terrazas v. Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991)). Frew misplaces reliance on *Terrazas*, which was a plurality opinion that merely noted that the Attorney General, in the course of representing state defendants, may "propose a settlement agreement." 829 S.W.2d, at 722. Indeed, the Texas Supreme Court has since confirmed that "the Attorney General can only act within the limits of the Texas Constitution and statutes, and courts cannot enlarge the Attorney General's powers."

Perry v. Del Rio, 67 S.W.3d 85, 92 (Tex. 2001) (citing *Terrazas*, 829 S.W.2d, at 735 (Cornyn, J., concurring)).

Because no properly authorized officer of the State waived the State's immunity to suit in the federal courts—through agreement to the consent decree or any other action—no valid waiver of Texas's Eleventh Amendment immunity occurred.

2. The States' legislatures—not executive or administrative officials—are uniquely equipped to decide whether and where to consent to suit.

The Court should look to *Ford*'s reliance on state law to define the authority to waive a State's immunity—especially when state defendants find themselves involuntarily in federal court—because to ignore state law on this question would divest state legislatures of the ability to manage both the public fisc and public programs providing for the health and welfare of the State. Indeed, ignoring the authority issue would permit a small group of executive officials and their lawyers to bind the State to ongoing multi-million-dollar obligations without any input from the politically responsive and accountable legislative branch.

The decision to consent to suit has traditionally rested with the legislatures of the States. *See, e.g.*, *Alden*, 527 U.S., at 757-58. Not surprisingly, States have consistently confirmed their legislatures' exclusive authority to waive sovereign immunity. *See, e.g.*, TENN. CONST. art. I, §17; *Baker v. Ives*, 294 A.2d 290, 298 (Conn. 1972). States have chosen to locate that authority in their legislatures because legislatures are best equipped to determine the circumstances under which a State should consent to suit, given that suits may drain the States of scarce monetary resources and threaten "other important needs and worthwhile ends [that] compete for access to the public fisc." *Alden*, 527, U.S., at 751. Indeed, because "allocation

of scarce resources among competing needs and interests lies at the heart of the political process," decisions to surrender the protections of sovereignty likewise "must be reached after deliberation by the political process established by the citizens of the State." *Id.*

The inherent need to allocate responsibilities appropriately between branches of government is particularly compelling in institutional reform litigation. Entering into a consent decree in such cases can reach far beyond the parties to the suit, significantly affecting the State's fisc, available public services, and financial burdens on citizens through increased taxes. Assistant attorneys general and state agency officials should not be permitted, by agreement, to usurp the legislature's key policy-making function. *See* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 34 (1987) ("If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds."); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1294-95 ("Nominal defendants are sometimes happy to be sued and happier still to lose.").

Accordingly, a State should not be deemed to have consented to suit unless its legislature has determined that such consent promotes the State's interests and reflects its citizens' will. Inferring consent to suit from other sources—such as an assistant attorney general's litigation conduct—would impermissibly "deprive the legislature of the power of judging what the honor and safety of the state may require," which is constitutionally the proper province of the Legislature. *Hans*, 134 U.S., at 21.

D. Limiting a Federal Court's Enforcement Authority to Violations of Federal Law Effectuates the Eleventh Amendment's Jurisdictional Constraints on Federal Power and Does Not Promote Gamesmanship or Impugn the Integrity of Federal Courts.

Equating state officials' agreement to a consent decree with a waiver of the State's Eleventh Amendment immunity from suit would not advance the interests that ordinarily motivate recognition of waivers through voluntary invocations of a federal court's jurisdiction. *See Lapides*, 535 U.S., at 614 ("In large part the rule governing voluntary invocations of federal jurisdiction has rested upon the problems of inconsistency and unfairness that a contrary rule of law would create."). Unlike in *Lapides*, here the circumstances do not support any inference of gamesmanship or forum shopping.

In this case, defendants were involuntarily haled into federal court on federal-law claims. The state-agency defendants invoked Eleventh Amendment immunity and were dismissed from the suit. The state-official defendants also moved to dismiss, but the district court retained jurisdiction over those claims under *Ex parte Young*. Contrary to Frew's assertion, these officials' effort to avoid litigation by settling the case through a consent decree was not an invocation of federal jurisdiction akin to that in *Lapides* (removal), *Gardner* (filing a proof of claim), or *Clark* (intervening). Rather than seeking to get *into* federal court for an adjudication of rights, these state defendants found a way out of defending Frew's federal lawsuit by entering into an agreed decree. As soon as Frew attempted to enforce decree provisions that exceeded federal law, the state officials objected because an official-capacity suit seeking to impose obligations beyond federal law falls outside the *Young* doctrine and, therefore, is barred by the Eleventh Amendment. *See supra* Part I.A. That objection was an assertion of a proper constitutional defense at the first available opportunity.

Nor, as Frew suggests, does it impugn the integrity of federal courts to respect the constitutional constraints on federal power imposed by the Eleventh Amendment and to deny enforcement of provisions in court-ordered decrees that exceed the requirements of federal law.[33] Federal courts routinely vacate or modify consent decrees that no longer serve the legitimate purpose of vindicating supreme federal law. And, to the extent ongoing violations of federal law remain, *Young* continues to afford jurisdiction to remedy those violations. *Young* does not, however, afford perpetual jurisdiction for federal courts to micromanage state programs that do not contravene federal law.

As a result of the state officials' choice to avoid federal litigation and settle Frew's suit, Frew obtained a decree under which the Texas EPSDT program made substantial strides to the significant benefit of the plaintiff class. Those gains are not compromised by recognition that the suit proceeded from the outset under the authority of *Ex parte Young*, and, pursuant to that doctrine, future requests for judicial enforcement of the decree remain dependent on allegations of ongoing violations of federal law.

III. EVEN IF THE COURT DECIDES THAT THE STATE RELINQUISHED ITS ELEVENTH AMENDMENT IMMUNITY, THE STATE RETAINED OTHER INVIOLABLE ATTRIBUTES OF SOVEREIGNTY THAT RESTRICT THE DISTRICT COURT'S ENFORCEMENT POWER.

If the Court decides that the State waived its Eleventh Amendment immunity, the district court nevertheless cannot enforce the decree provisions at issue

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33. Frew asserts that *Ex parte Young*'s jurisdictional limitation will result in state officials "ignor[ing] validly adopted orders." Pet'r Br., at 32. But there has been no suggestion that anybody ignored a court order; rather, the State litigated the enforceability of the court's remedial order because it exceeded the dictates of federal law.

because the state officials' entry into the consent decree did not relinquish the other inviolable aspects of the State's sovereignty. *See Alden*, 527 U.S., at 715 (recognizing the States' "residuary and inviolable sovereignty"); *see also supra* Section II.B.3. Indeed, Frew has advanced only that Eleventh Amendment immunity was surrendered through the consent decree; she has never suggested that all of the attributes of the State's sovereignty were relinquished. *See, e.g.*, Pet'r Br. i. As a sovereign—absent the mandate of the Supremacy Clause and an ongoing violation of federal law—the State should not be subject to the commands of a federal court regarding policy decisions for a social services program that it has been charged with administering.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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July 2, 2003